ing proper notice (McIntyre R. 3), filed suit in the United States District Court at Beaumont, Texas on June 21, 1960, alleging that the amount in controversy was in excess of $10,000.00, exclusive of interest and costs (McIntyre R. 2-4), basing the jurisdiction of its suit on diversity of citizenship (McIntyre R. 2). The filing of the suit had the legal effect of setting aside the award of the Board (See Art. 8307, Sec. 5, Vernon's Tex. Civ. Statutes attached hereto as Appendix G).

After the filing of Petitioner's suit, the Respondent on June 23, 1960 filed suit in the District Court of Jefferson County, Texas, in which he sought to set aside the award of the Texas Industrial Accident Board, and alleged the amount of his damages to be $27.00 per week for a period of 401 weeks and $2000 medical expenses—a total of $12,827.00 (McIntyre R. 13-15), and which amount in controversy in the State Court has never been decreased (See McIntyre R.).

Respondent filed a motion in the Federal Court to dismiss Petitioner's suit for want of jurisdiction, and "subject" thereto an original answer and counterclaim in which he claimed $27.00 per week for a period of 100 weeks plus $21.00 per week for 300 weeks (McIntyre R. 17, 21). The federal trial judge granted the motion to dismiss and dismissed Petitioner's suit for want of jurisdiction (McIntyre R. 25, 35). Petitioner was then left in the State Court as defendant upon the same claim for workmen's compensation but in the amount of $12.827.00 (McIntyre R. 17-22).

Petitioner promptly perfected its appeals from said trial court's orders, and the United States Court of Appeals for the Fifth Circuit, by a divided court, affirmed the action of the trial judge, upon the theory that a correct interpretation of *Horton v. Liberty Mutual Ins. Co.*, 6 L. Ed. 2d 890, *affirming the Fifth Circuit's judgment in* 275 F. 2d 148, required the jurisdictional amount in such cases to be determined by the amount of Respondent's cross-action, rather than the good faith allegations made by Petitioner in the complaint (See Appendix A for opinion of the Court of Appeals and for Judge Hutcheson's dissent; and also see Appendix B attached hereto for opinion and dissent by Judge Rives in *Horace Hart v. United States Fidelity and Guaranty Company*).

Petitioner sincerely believes, with Justices Hutcheson and Rives, that Horton requires jurisdiction of the Federal Courts in such cases to be determined by the good faith allegations in the complaint rather than by the amount of the counterclaim, and within the proper time it seeks a writ of certiorari to correct the erroneous conclusion of the majority of the Fifth Circuit.

(Hart)

Respondent, Hart, alleged in his claim before the Texas Industrial Accident Board that he sustained a general injury (R. Hart 18) while employed by Wesco Materials Corporation in Dallas County, Texas, November 28, 1959. His claim would have supported a recovery before the Board of $14,-

035.00 (See Art. 8306, sec. 10, of Vernon's Texas Civil Statutes attached hereto as Appendix H).

The Board made an award of $910.00 (R. Hart 19). After giving proper notice (R. Hart 20), Petitioner filed suit in the Federal District Court at Dallas, Texas within the proper time (R. Hart 4) alleging that more than $10,000, exclusive of interest and costs, was the amount in controversy (R. Hart 5) basing jurisdiction on diversity of citizenship (R. Hart 4, 5). Filing of the suit had the effect of setting aside the award of the Board (See Art. 8307, sec. 5, Appendix G).

Respondent moved to dismiss for want of jurisdiction and filed a counterclaim for $6310.00 (R. Hart 9-15).

Although Respondent claimed in his pleadings in the Federal Court that less than $10,000 was involved, he waived all claims as to lack of jurisdiction and demanded a trial (R. Hart 22). As a result of a trial to a jury, Respondent was awarded $1224.00 (R. Hart 24). Respondent also filed a motion for new trial in which he challenged the jurisdiction of the court but then voluntarily withdrew any presentation of the motion to the trial court (R. Hart 26, 29 and 30).

Under Supreme Court Rule 20, Respondent applied for a writ of certiorari to this Honorable Court while his appeal was pending in the Court of Appeals. Respondent's counsel at that time had a motion for rehearing pending in this Honorable Court in *Horton v. Liverty Mutual Ins. Co., 6 L. Ed. 2d 890*, and in this manner sought simultaneous and joint consideration of both cases. Both his application in

Hart v. United States Fidelity and Guaranty Company (No. 372), *7 L. Ed. 2d 95*, and his motion for rehearing in *Horton* were denied, *7 L. Ed. 2d 70 (Oct. 1961)*.

Respondent then returned to the United States Court of Appeals for the Fifth Circuit, from which Court he obtained, by a divided court, a reversal of the judgment below founded upon the contention that a correct interpretation of *Horton v. Liberty Mutual Ins. Co., 6 L. Ed. 2d 890, affirming the Fifth Circuit itself, 275 F. 2d 148*, required jurisdictional amount in such cases to be determined by the amount of the counterclaim rather than by the good faith allegations of the complaint (See Appendix B for opinion of the Court and Judge Rives' dissent. See also Appendix A attached hereto for supporting opinion and dissent in *Hardware Mutual Cas. Co. v. McIntyre*—handed down at the same time in which Judge Hutcheson dissented and upon which disposition of Hart by the majority is based).

Petitioner, United States Fidelity and Guaranty Company, files this petition for writ of certiorari within the proper time challenging the correctness of this ruling.

(Aguirre)

September 26, 1961, Petitioner, Standard Accident Insurance Company, on the basis of undisputed diversity, after giving proper notice (R. Aguirre 2, 3, 18) and within the proper time, instituted this suit in the Federal District Court for the Western District of Texas at San Antonio, Texas, alleging that more than $10,000 was the amount in controversy (R. Aguirre pp. 1 to 3). *Aguirre had claimed*

$14,035 before the Board (R. Aguirre pp. 17, 18). After the suit had been filed in the Federal Court, *Aguirre filed suit in the State Court claiming $14,035* (R. Aguirre p. 18). However, in his counterclaim in the Federal Court, Aguirre only claimed $8750 (R. Aguirre p. 18). He also moved to dismiss the federal court suit for want of jurisdiction (R. Aguirre pp. 4, 18). This motion was granted (R. Aguirre p. 17).

Appeal to the United States Court of Appeals for the Fifth Circuit was duly perfected by the insurance carrier. By a divided court, that Court has affirmed the trial court's order of dismissal (Appendices C and A). This Petition for Writ of Certiorari is filed within the time permitted by law to test the propriety of this ruling.

REASONS FOR GRANTING THE WRIT

SUMMARY

Certiorari should be granted because the majority of the Court of Appeals for the Fifth Circuit has decided an important question of federal jurisdiction in conflict with the recent holding of this Court in *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348, 6 L. Ed. 2d 890 (1961)* and with its own holding in *Liberty Mutual v. Horton, 275 F. 2d 148.* Judges Rives and Hutcheson, both of whom participated in the *Horton* case, dissented on the ground that the majority's holding "goes directly counter to the holding of the Horton cases."[1] The majority of the Court of Appeals based federal

[1] See Judge Hutcheson's dissent, Appendix A-12. Also, Judge Rives' dissent, Appendix B-3.

jurisdiction solely on the amount sought in the counterclaim filed in federal court instead of on the allegations set forth in the complaint, as required by *Horton v. Liberty Mutual.*

This failure to follow the *Horton* decision allows the claimant to defeat federal jurisdiction at will by formal allegations in his counterclaim that less than $10,000.00 is involved. It makes no difference that at the same time a state court suit is pending in which he is actively seeking a sum in excess of $10,000.00.[2] This Honorable Court recognized the importance of maintaining a definite and stable rule for determining federal jurisdiction when it decided the *Horton* case. The majority of the Fifth Circuit refuses to follow such rule.

I. The majority of the Fifth Circuit erred in its interpretation of *Horton v. Liberty Mutual* when it held that the counterclaim, instead of the complaint, determines federal jurisdiction.

A. *Analysis of Horton v. Liberty Mutual.*

Petitioners agree with the majority to the extent it said, "Any analysis of the problem herein involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Company*, 367 U. S. 348."

In the *Horton* case, the claimant specifically sought $14,035.00 before the Industrial Accident Board, $14,035.00 in his federal counterclaim and $14,035.00 in his suit pending

[2] See Judge Hutcheson's dissent, Appendix A-12. Also, Judge Rives' dissent, Appendix B-3.

in the State court. The Court of Appeals for the Fifth Circuit in their decision of *Liberty Mutual v. Horton, 275 F. 2d 148*, held that the amount in controversy is determined according to Texas law; but, in the alternative, jurisdiction would exist under the general federal rule, based on the good faith allegations in the complaint. When this issue was decided by this Honorable Court, it was decided on the identical basis as the alternative opinion of the Fifth Circuit and the same cases were cited. In analyzing this Honorable Court's opinion in *Horton*, the governing portion thereof at *p. 894 L. Ed. 2d*, can be broken down into three important statements:

(1) "Determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards." State law is to be looked to only to determine the nature and value of the rights involved. (2) "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith, we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'" (3) *In applying the "general federal rule" to the facts* before the Court in *Horton*, the Court concluded "* * * there has been no other showing, let alone a showing to a legal certainty, of any lack of good faith *on the part of the respondent* (insurer) in alleging that a $14,035.00 claim is involved." (Emphasis and parentheses added.) This indicates that the

Court was applying the general federal rule, which it had just stated, to the facts then before it.

By focusing solely on the Supreme Court's discussion of the facts involved in *Horton* and ignoring the *rule* stated, the majority of the Court of Appeals concluded that the amount sought in the counterclaim was the *sole test* of federal jurisdiction. Thus, it concluded, if the counterclaim is for less, jurisdiction, even though at first present, automatically vanishes. The majority of the Fifth Circuit does *not* say that the amount asserted in the counterclaim determines the good faith or bad faith of the allegations in the complaint. It does *not* say that the lesser amount placed in the counterclaim establishes lack of good faith in the complaint to a "legal certainty". Such a statement would be unrealistic and unfair, but would be within the limits of the "general federal rule" announced in *Horton*. Instead, the Court adopted a *new, untested, and untried rule* for determining federal jurisdiction based upon the idea that the counterclaimant is the *real plaintiff*, and cites *Horton* as supposed authority for the new rule. Having ventured this far afield, the Court then proceeds to discard completely and without discussion any requirement of good faith on the part of the counterclaimant. Under the majority's rule, no amount of evidence indicating bad faith on the part of the counterclaimant could prevent the federal court from dismissing for lack of jurisdiction. No better illustration of this can be found than in *McIntyre*, where a claim for $12,827.00 has been pending in the State Court all along. Horton plainly did not establish this rule

This error is concisely pointed out by Judge Rives in his dissent in Hart v. U. S. F. & G. Co., Appendix B-3.

and the majority was unable to cite a single case that did. The rules set out in *Horton* were taken from *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U. S. 283, 288, 82 L. Ed. 845, 848, 58 S. Ct. 586; Bell v. Preferred Life Assur. Soc., 320 U. S. 238, 240, 88 L. Ed. 15, 17, 64 S. Ct. 5;* and *Aetna Casualty & S. Co. v. Flowers, 330 U. S. 464, 468, 91 L. Ed. 1024, 1027, 67 S. Ct. 798*, all of which were cited in the opinion. To interpret *Horton* as basing jurisdiction on the counterclaim, as done by the majority, is to declare that the Supreme Court followed its previous holdings in one sentence and overruled them two sentences later.

B. *Reduction of Claim or Counterclaim Cannot Defeat Federal Jurisdiction.*

Attempts to defeat federal jurisdiction by artful pleadings are not new. *St. Paul Mercury v. Red Cab*, supra, was a case in which a state court plaintiff attempted to reduce his claim to below the jurisdictional amount after the case had been removed to the federal court. After holding that such reduction would not oust federal jurisdiction, the court said at page 294, U. S. 303:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat Federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election."

If the facts of the *Red Cab* case were presented to the majority of the Fifth Circuit, to be consistent, it would say as it did in *McIntyre*, that upon reduction of the state court plaintiff's claim after removal to the federal court "* * * it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances can the insured recover more than $10,000.00 in the suit. This being so, there is no Federal jurisdiction." (Appendix A at page A-8.) The principle in both cases is the same. This illustrates about the only moment of wisdom displayed by the majority when it admitted that its ruling "depart(s) from traditional notions of pleading Federal jurisdiction * * *." (Taken from the majority opinion in *McIntyre*, Appendix A at page A-7.) The comments in the *Red Cab* case illustrate the sound reasoning behind the rule set forth at page 289 therein that "events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

Chief Justice Marshall in *Mollar v. Toran, 9 Wheat. 537, 539, 6 L. Ed. 154, 155*, said, "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events". So well established is this rule that even if the pleadings indicate a valid defense to the claim, federal jurisdiction is not defeated. *St. Paul v. Red Cab*, at p. 289. In fact, where the complaint as filed in the state court states an amount in controversy sufficient to confer jurisdiction upon the federal court and after removal

to the federal court the complaint is dismissed, the Federal Court, nevertheless, retains jurisdiction of a counterclaim below the jurisdictional amount. *Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 L. Ed. 911,* and cases cited therein. Judge Rives correctly points out in his dissent that the majority has abandoned "the long-established logical doctrine that jurisdiction must exist from the time it is first invoked, that is, when the suit is filed." (Appendix B-4.)

II. Federal jurisdiction is determined by the amount in controversy as alleged in the complaint unless it is shown that the allegations are not made in good faith. *Horton v. Liberty Mutual,* supra.

This is the interpretation placed on *Horton v. Liberty Mutual* by dissenting Judge Rives and Hutcheson (Appendices A-12, B-3. This is also the interpretation placed on *Horton* by Professor Bickel in *75 Harv. L. Rev. 168, 170,* where he concluded, "But since under Texas law the insurer was seeking to avoid a possible $14,035.00 liability, its complaint, without reference to any possible counterclaim, put the requisite amount in controversy."

A. *Amount in controversy as alleged in the complaint is the maximum potential liability of the insurer.*

The complaints filed in all three cases indicated that the insurers each felt that a potential liability in excess of $10,000.00 existed. In each case, they had faced such a potential liability before the Industrial Accident Board. It has been consistently held when a party sued to be relieved

of a contractual obligation, statutory regulation, or taxation, that his maximum potential liability determined the amount in controversy. The value of this potential liability is tested by the value of the right to be free from the tax, the statute or the claim. *McNutt v. General Motors, 298 U. S. 178, 80 L. Ed. 1135; Gibbs, v. Buck, 307 U. S. 66, 83 L. Ed. 1111; Packard v. Banton, 264 U. S. 140, 142, 68 L. Ed. 596, 607; City of Memphis, Tenn. v. Ingram, 195 F. 2d 338.* When suit is brought by an insurance company in a federal court to rescind a policy, to declare its rights thereunder, or to enjoin a State court proceeding, the amount in controversy is the maximum potential liability of the company. *Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. 2d 388; Mutual Benefit Health & Acc. Assoc. v. Fortenberry, 98 F. 2d 570; Hartford Acc. & Indem. Co. v. Northwest Nat. Bank, 228 F. 2d 391; N. Y. Life Ins. Co. v. Swift, 38 F. 2d 175.*

The rule announced by the majority would look *only* to the potential liability of the company as stated in the counterclaim in the federal court proceeding. A similar narrow and unrealistic viewpoint was rejected in *Red Cab. Horton* looked at the "whole record", including the claim before the Board and the amount claimed in the State court suit. The court in *Horton* concluded: "No matter which party brings it into Court, the controversy remains the same: it involves the same amount of money. * * *." In contrast, the majority rule in the cases at bar leaves determination of the amount in controversy to the discretion of the claimant, who can

change it from time to time in the various proceedings depending on the result desired at the moment. As a matter of right, the claimant may amend in the State court to claim more than $10,000. See *Booth v. Texas Employers, 123 S. W. 2d 322*, Point 13 (Opinion adopted Sup. Ct. of Texas).

Petitioners do not take the position that *Horton* held that the amount claimed before the Industrial Accident Board automatically determines federal jurisdiction, but certainly the claim, together with the Texas compensation law, must be looked to "to determine the nature and extent of the right * * *" sought to be protected, as stated in *Horton*. The majority has declined to recognize this method of determining the amount in controversy.

B. *Good Faith.*

The *Horton* case stated and followed the rule that the allegations in the complaint fix jurisdiction unless it is in some way shown that they are not made in good faith. In contrast, the majority dispenses with good faith, thus allowing the counterclaimant to reduce his claim in federal court and simultaneously, or subsequently, sue for $14,035.00 in the State court. The *McIntyre* case vividly illustrates this point. In that case, the fact that the counterclaimant was seeking more than $10,000.00 in the State court appears to be the strongest evidence of a lack of good faith on *his* part. It also verifies the good faith of the allegations in the com-

plaint.[4] Undoubtedly, the majority viewed the problem it was creating more realistically than it indicated in its opinion, and dispensed with good faith on the part of the counterclaimant simply because *under its rule, there is no way good faith can be required of the counterclaimant.* This occurs because he is free to increase the amount of his demand in the State court after federal jurisdiction is dismissed. Thus, a claimant more subtle than *McIntyre* will seek less than $10,000.00 in his counterclaim in the Federal Court and less than $10,000.00 in the State Court *until federal jurisdiction is dismissed* and then amend asking for the full $14,035.00. The fact that he previously claimed less can be explained away to the satisfaction of a jury in countless ways. It is thus obvious that the good faith or bad faith of the counterclaimant can seldom be determined until federal jurisdiction is *lost*. It is submitted that the majority must have had these obvious facts in mind when it eliminated from its new rule any requirement of good faith on the part of the counterclaimant—real plaintiff.

As illustrated by the Fifth Circuit's attempt to place jurisdiction solely on the counterclaim, attempts to determine federal jurisdiction with mathematical-like precision from the pleadings *only* will make such jurisdiction com-

[4]There is no finding in any of these cases by the courts below that good faith of the insurance carrier was non-existent. In Hart, Respondent waived all objections to jurisdiction, demanded trial which was accorded him, and waived any challenges to good faith. At the time Aguirre claimed only $8,750 in his counterclaim in federal court, he was simultaneously suing for $14,035 in the state court (R. Aguirre p. 18).

pletely artificial. A good faith requirement was included in the "general federal rule" for this very reason. This question of good faith can and should be gone into at a pre-trial hearing in accordance with Rule 12(b) and (d). Concerning this point, it was said in *Firemen's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 784:* "Such a rule (that a valid defense in diminution of the amount claimed does not necessarily diminish the amount that is or may be claimed in good faith by the Plaintiff), does not contravene another well settled rule that the court has the power to determine in every case whether the prerequisites to jurisdiction in fact exist and such jurisdictional issues are properly triable to the court prior to a trial on the merits. Rule 12(b) and (d), Rules of Civil Procedure, 28 U.S.C.A. The manner in which such a determination should be made is left to the trial court. *Gibbs v. Buck*, 307 U. S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111. The court may inquire by affidavits or otherwise into the facts as they exist. It is not, however, a hearing upon the merits. *Land v. Dollar, 330 U. S. 731, 735, note 4, 67 S. Ct. 1009, 91 L. Ed. 1209.*" At this hearing, the trial court can examine previous claims, medical evidence, prior settlement offers, the nature of the injury, and the claim before the Board, to determine the good faith of the alleged controversy. The very function of the pretrial procedure is to eliminate superfluous and unreal issues. It is the same with regard to jurisdictional questions. In view of this procedural safeguard, there is no basis for any apprehension

that the federal courts will be inundated with trivial workmen's compensation cases.

CONCLUSION

In deciding *Horton* this Court evidently felt satisfied with the rule that good faith allegations in the complaint should determine the amount in controversy for jurisdictional purposes in the federal court. Its holding in *Horton* will be completely frustrated if the majority opinions in the cases at bar are allowed to stand as the official interpretation of *Horton*. This will produce a chaotic condition in the important matter of federal court jurisdiction. Its effect will not be restricted to workmen's compensation cases but will reach to many other types of cases. The real necessity for granting writs of certiorari in the cases at bar stems from the reality that unless the erroneous interpretation of *Horton* is corrected, hereafter federal jurisdiction will turn upon fictitious pleadings asserted in a counterclaim. The damage this will do to the prestige and dignity of federal courts is incalculable.

For these and the foregoing reasons petitioners pray that this Petition for Writs of Certiorari be granted and that the judgments of the majority of the Fifth Circuit in each case be summarily reversed as being in conflict with *Horton* (See Judge Hutcheson's dissent, Appendix A-12). In the alternative, that the writs be granted and that upon final hearing, the judgments of the majority of the Fifth Circuit be reversed. Petitioners in *McIntyre* and *Aguirre* pray that the trial courts' judgments of dismissal also be reversed and

Petitioner in *Hart*, that the judgment of the trial court be affirmed. They pray for all costs of suit and such other relief as they may show themselves entitled to.

Respectfully submitted,

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By Reo Knowles
Of Counsel

AFFIDAVIT OF SERVICE

I, Reo Knowles, of counsel for Petitioners, do hereby certify that service of copies of the foregoing Petition for Writs of Certiorari has been made on each of Respondents by mail in accordance with Rule 33 of the Rules of this Court.

Dated this 9th day of August, 1962.

Reo Knowles
REO KNOWLES,
Of Attorneys for Petitioners.

APPENDICES

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18557

(R. McIntyre 44)

HARDWARE MUTUAL CASUALTY COMPANY,
Appellant,

versus

ADAM McINTYRE,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(June 20, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: The single question presented by this appeal is whether the District Court properly dismissed appellant's suit for want of jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed the sum of $10,000 as required by 28 U.S.C.

§1332. For the reasons hereafter stated, we affirm the judgment of the District Court.

On January 15, 1960, the appellee, Adam McIntyre, a resident of Texas, was injured while working for his employer in Nome, Texas. The employer's compensation carrier under the Texas Workman's Compensation Law was the appellant, Hardware Mutual Casualty Company, a Wisconsin corporation. On February 25, 1960, the appellee filed a claim with the Texas Industrial Accident Board in which he simply described the circumstances surrounding his injury did not request a specific amount of compensation.[1]

On June 20, 1960, the Board awarded the appellee compensation in the amount of $22.01 per week for 15 consecutive weeks commencing January 16, 1960, or a total of $330.15.

The very next day, the appellant filed this suit to "set aside" the award. The complaint alleged generally that the matter in controversy exceeded $10,000, and specifically, that:

> "The claim filed by the defendant for compensation with the Industrial Accident Board of Texas is for total and permanent incapacity . . . and although the claim for compensation is not set out with particularity [with respect to] the amount of money [claimed] . . . [the] amount fixed by law for compensation [for total and permanent incapacity] is a sum which is within the jurisdiction of this Court; . . . ."

[1] Appellee's claim stated simply that "while he was jacking up a tractor, the jack leg fell, causing the tractor to fall on his left shoulder and right leg." On March 15, 1960, the appellee amended his claim to state the following: "I was taking a wheel off a tractor and it fell on me, breaking my left clavicle and injuring my left shoulder, back and side and causing general injuries to my body."

The source of appellant's dissatisfaction with the award is revealed in the following allegation of the complaint:

> "The plaintiff paid defendant compensation until on or about the 15th day of April, 1960, and suspended and stopped the payment of same because the claimant was then capable and able to do the same type of work as before his alleged injuries and plaintiff so advised the Industrial Accident Board of the State of Texas to such effect and plaintiff is now claiming and does claim that defendant is not entitled to recover for compensation from plaintiff or in the amount as shown and set forth in the above mentioned award of the Industrial Accident Board of Texas. The defendant has been paid for his temporary total incapacity and plaintiff denies that defendant has any residual disability or any loss of earning power or any loss of wage earning capacity."[2]

The complaint prayed for judgment "setting aside" the award and that the appellee "be denied any and all relief by way of compensation."

On July 13, 1960, the appellee moved to dismiss the complaint for want of jurisdiction, alleging that he did not claim "total and permanent incapacity" before the Board, that he did not claim compensation in excess of $10,000 before the Board, and that the amount in controversy thus did not exceed $10,000. On the same day, the appellee filed his answer to the complaint, which contained essentially the same allegations as were contained in his motion to dismiss. The answer further alleged that the appellee "sustained some total disability but that said total disability was not permanent." Also on July 13, 1960, the appellee filed a counterclaim

[2] In other words, the appellant claims that the award gave the appellee $44.02 too much.

against the appellant wherein he claimed total disability for 100 weeks and partial disability for another 300 weeks. The counterclaim prayed for judgment in the sum of $27 per week for 100 weeks and $21 per week for 300 weeks, or a total of $9,000.

Prior to July 13, 1960, and on June 23, 1960, the appellee had filed a civil action against the appellant in a Texas state court wherein he alleged total disability for 401 weeks. The complaint in the state court prayed for judgment in the sum of $27 per week for 401 weeks plus $2,000 medical expenses, or a total of $12,827.

On August 15, 1960, the District Court granted appellee's motion to dismiss on the grounds (1) that the appellee had not claimed compensation in excess of $10,000 before the Texas Industrial Accident Board and (2) that the appellee had not sought to recover a sum in excess of $10,000 in the instant suit.

Any analysis of the problem here involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U. S. 348. That case, as this one, concerned a suit by an insurer to "set aside" an award of the Texas Industrial Accident Board. The award in that case was $1,050. The injured workman had claimed $14,035 before the Board, had instituted a suit in a state court for $14,035, and had counterclaimed in the federal action for $14,035. The Court upheld the jurisdiction of the district court in the following language:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of fed-

eral jurisdiction is a federal question to be decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board.

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035; which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. *No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy.* It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a *de novo*

> court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000. (Emphasis added)

One thing appears clearly from the foregoing language; and that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to "set aside" the award. This is because the mere filing of suit by the insurer absolutely nullifies the award, so that its amount can never be said to be "in controversy" in the action. Indeed, the mere mention of the nature or amount of the award during the trial has been held to be prejudicial error by the Texas Courts. *Fidelity Union Casualty Co. v. Klatt*, 47 S. W. 2d 417.

We interpret Horton to prescribe the following test for determining whether federal jurisdiction exists when an insurer brings suit to "set aside" an award of the Texas Industrial Accident Board: If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to "set aside" the award, federal jurisdiction exists *unless* the insured denies the allegation that he will seek more than $10,000 in the court action and makes an affirmative claim for compensation for a sum which does not exceed $10,000.

We realized of course, that such a rule gives the insured the power to defeat federal jurisdiction simply by asserting a claim for less than $10,000 after he is brought into court by the insurer. But, however much this may depart from traditional notions of pleading federal jurisdiction, the procedure for "setting aside" an award established by the Texas Compensation Law leaves no satisfactory alternative. The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to "set aside" the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogates the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. See *Zurich General Accident Co. v. Rodgers*, 97 S. W. 2d 674; *Texas Reciprocal Ins. Ass'n. v. Léger*, 97 S. W. 2d 677. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to "set aside" the award. To the contrary, once an action such as this is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such an action, it is a "plaintiff" in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to

this notice by filing a claim for compensation against the insurer. The insured's "counterclaim" is, for all intents and purposes, the *only* claim involved in the action. If the insured asserts a claim for compensation for a sum which does not exceed $10,000, it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances, can the insured recover more than $10,000 in the suit. This being so, there is no federal jurisdiction.

The appellant argues that the amount in controversy can best be determined by looking to the amount claimed by the insured before the Industrial Accident Board. For one thing, it does not appear that the test suggested by the appellant was adopted by the Supreme Court in Horton. For another, assuming the question was an open one, we think the rule proposed by the appellant has little to recommend it.

In Horton, the Supreme Court specifically noted that we are not bound by the Texas rule which, in certain cases, provides that the amount in controversy is fixed by the amount claimed by the insured before the Industrial Accident Board. After so noting, the Court did not say that we should adopt this rule as a matter of federal law. Rather, the Court went to some lengths to point out that the insurer in that case had alleged that the insured had claimed and *would claim* in excess of $10,000, and that the insured had made "no denial of these allegations." If the Court had meant to adopt the test urged by the appellant here, it could have done so in plain and simple language. In that event, we think, the opinion would not have emphasized, as it did, that

the *insured* was vigorously asserting a claim for compensation for a sum exceeding the jurisdictional amount. In short, we do not think that the majority opinion in Horton is fairly susceptible to the interpretation which the appellant places upon it.

Moreover, it seems to us that the rule proposed by the appellant has at least two serious shortcomings. First of all, the Texas Compensation Law does not require an insured to claim a specific sum of money before the Industrial Accident Board; nor does it even require him to state sufficient facts from which the amount claimed can be definitely be determined. *Booth v. Texas Employers' Ins. Ass'n*, 123 S. W. 2d 322. Thus, if the rule suggested by the appellant was adopted, it would be impossible to fix the amount in controversy in a case where the insured did not claim a specific sum before the Board and did not state sufficient facts from which the amount claimed could be determined. Since the latter situation is apparently of common occurrence, appellant's suggested test would have rather limited utility.

Secondly, the Texas law is clear that the insured is not ordinarily bound by the amount which he claims before the Board. Where, as here, the claim is for general injuries suffered, the insured, in a court action to "set aside" the award, can increase the amount of his claim to include compensation for all injuries proximately resulting from the accident. *Booth v. Texas Employers' Ins. Assn, supra.* Similarly the insured can reduce the amount of his claim if he sees fit to do so. Thus, the amount of the claim before the Board is

hardly a reliable indicator of the amount actually in controversy in the federal court action.

The appellant contends that it would be unfair to permit the insured to defeat federal jurisdiction by claiming less than the jurisdictional amount in the action, since the insured would then be free to assert a claim for more than $10,000 in a state court action and the insurer would be unable to remove to a federal court because of the Congressional ban on the removal of state workman's compensation cases. See 28 U.S.C. §1322. Of course, the simple answer to this is that, regardless of any possible unfairness a federal court does not have jurisdiction in a diversity case unless the amount in controversy exceeds the sum of $10,000. Appellant's argument would be equally applicable, and equally unavailing, in numerous other cases where the amount in controversy does not reach the federal standard. For example, suppose a plaintiff brought suit against a defendant for $5,000 and alleged that the defendant had a compulsory counterclaim against the plaintiff for $15,000. Certainly, the defendant would be entitled to have the case dismissed for want of jurisdiction, even though the defendant could then bring suit for $15,000 in a state court and the case could not be removed because the suit was commenced in the original plaintiff's home district. However real the possibility of losing and opportunity to have the case tried in a federal court, it cannot vitiate the fact that the amount in controversy in an action such as the instant one is the amount claimed by the insured in the action and that, where the amount there claimed does not exceed $10,000, the federal

standard has not been met. We might note, on the other hand, that if an insured subsequently sues in a state court for more than $10,000, he would probably have some difficulty overcoming the effect of his previous judicial admission that he was not entitled to more than $10,000. This may well afford all the protection the insurer needs.

In the present case, it appears that the appellee did not claim more than $10,000 before the Industrial Accident Board and that he counterclaimed for $9000 in the action commenced by appellant. The District Court, in a decision rendered before the Supreme Court's decision in Horton, dismissed the appellant's action on both the above grounds. For the reasons heretofore stated, we think dismissal was justified on the sole ground that the appellee's claim in the action was for less than $10,001. The judgment is, therefore,

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

I would simply "reverse on the authority of the *Horton* cases." As I read these cases, which are controlling here, it is quite plain that Judge Fisher's holding in this case, that federal jurisdiction did not exist, is not supported by the holding in those cases, that *the claim of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty to be not stated in good faith.* Judge Fisher's finding in this case that, though the plaintiff sued in the state court for $12,827, he could, by limiting his counter-claim in federal court to $9000, defeat the jurisdiction as asserted in the insurer's *suit, in my opinion, goes directly counter to the holding of the Horton cases,* and his judgment must be reversed, not affirmed.

I respectfully DISSENT from the opinion of the majority.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

By CLAIR R. JAMES
Dy. Clerk

[Seal] Aug 2 1962

JUDGMENT.

Extract from the Minutes of June 20, 1962

No. 18557
(R. McIntyre 56)

HARDWARE MUTUAL CASUALTY COMPANY

versus

ADAM MCINTYRE

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Hardware Mutual Casualty Company be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissents."

* * * * *

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19184

(R. Hart 41)

HORACE HART,

Appellant,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 20, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

CAMERON, Circuit Judge: The facts of this case bring it within the ambit of the decision of this Court in *Hardware Mutual Casualty Co. v. Adams McIntyre*, May, 1962, F. 2d . The facts in this case are these:

The appellee United States Fidelity and Guaranty Company, a compensation carrier of the employer of the appellant

Horace Hart, inistituted this diversity action to set aside a $910.00 award to appellant by the Texas Industrial Accident Board covering personal injuries growing out of appellant's employment. The complaint alleged that the amount in controversy exceeded $10,000.00. The appellant-employee moved to dismiss for want of jurisdictional amount, specifically denying in his answer that the amount in controversy exceeded $10,000.00, and filing a counter-claim for damages in the sum of $6,310.00. The appellant-employee, *pro se*, had filed a general claim for compensation with the Board for an injured back, but he did not claim more than $10,000.00 or any specific amount.

On the day of trial, June 12, 1961, the appellant consented to the exercise of jurisdiction of the court below,[1] and the trial proceeded, resulting in a judgment in favor of the appellant for $1,224.00, and costs, plus $385.00 previously paid under the maximum compensation rates. The appellant Hart had also filed suit in a state court of Texas to set aside the Board's award in which he demanded damages in the sum of $6,310.00 compensation, which suit is still pending. The appellee-insurer filed a plea in abatement in the state suit on the ground that this action was already pending in the court below.

The appellant-employee duly perfected his appeal to this Court. Prior to the judgment of this Court the appellant-employee filed a petition for writ of certiorari to the Supreme

[1]The waiver of jurisdictional amount by the appellant has no validity, it being settled that jurisdiction may not be conferred by consent, Kelly v. Hartford Accident & Indemnity Co., 5 Cir., 1961, 294 F. 2d 399, 409; People's Bank v. Calhoun, 102 U. S. 256; American Fire and Casualty Co. v. Finn, 351 U. S. 6.

Court of the United States. The Supreme Court denied certiorari on November 16, 1961, *Hart v. United States Fidelity and Guaranty Co.*, 368 U. S. 899.

Based upon the decision of this Court in the case of *Hardware Mutual Casualty Co. v. Adam McIntyre, supra*, the judgment here before us is reversed and the case is remanded to the district court for the entry of judgment dismissing this action on the ground that the statutory amount is not in controversy.

REVERSED AND REMANDED.

RIVES, Circuit Judge, dissenting:

With deference to my brothers of the majority, I agree with Judge Hutcheson's view[1] as to the teaching of the Supreme Court's opinion in *Horton v. Liberty Mutual Ins. Co.*, 1961, 367 U. S. 348.[2] The most significant passage in that opinion, I think, is:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that

[1] See Judge Hutcheson's dissent in Hardware Mutual Casualty Company v. McIntyre, 5 Cir., No. 18557, also decided today.

[2] It is interesting to note, however, that Judge Jones, the third member of the panel which decided the Horton case in this Court, see 275 F. 2d 148, is aligned with the present majority.

the claim is really for less than the jurisdictional amount to justify dismissal."[3]

> "[3]*Id., at 289* [*St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283]. See also *Bell v. Preferred Life Assurance Society*, 320 U. S. 238, 240; *Aetna Casualty Co. v. Flowers*, 330 U. S. 464, 468."

Chief Judge Tuttle for the majority emphasizes the following sentence:

> "No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing 'to a legal certainty,' of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy."[3]

To me that sentence and other similar parts of the opinion mean no more than that the Court was properly pointing to *facts in the case then before it* which established "good faith" beyond question. There was no suggestion that such extreme facts were essential to the Court's holding. The expression ". . . let alone a showing 'to a legal certainty' " clearly indicates that they were not so essential. To read the opinion otherwise would mean to abandon the long-established logical doctrine that jurisdiction must exist from the time it is first invoked, that is, when the suit is filed, and is to permit jurisdiction to remain "tentative" or in limbo subject to the arbitrary determination of the claimant as to the amount which he will seek to recover by his counterclaim. Candid recognition of that incongruity may be detected in Judge Tuttle's opinion for the majority: "But

[3]Hardware Mutual Casualty Co. v. McIntyre, 5 Cir., No. 18557, also decided today.

however much this may depart from traditional notions of pleading federal jurisdiction . . ."

If Judge Hutcheson and I are right in our view of the teaching of the *Horton* opinion, there is no such departure "from traditional notions of pleading federal jurisdiction." That much is clearly explained by the annotation in 75 Harvard Law Review 170:

> "But since under Texas law the insurer was seeking to avoid a possible $14,035.00 liability, its complaint, without reference to any possible counterclaim, put the requisite amount in controversy."

I respectfully dissent.

---

[1] St. Paul Mercury Indemnity Co. v. Red Cab Co., 1938, 303 U. S. 283, 292; Taylor v. Anderson, 1914, 234 U. S. 74, 75-76; Smithers v. Smith, 1907, 204 U. S. 632, 643; Kirby v. American Soda Fountain Co., 1904, 194 U. S. 141, 145-146; Gulf Refining Co. v. Price, 5 Cir., 1956, 232 F. 2d 25, 36.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,184
(R. Hart 46)

D. C. Docket No. 8527 Civil

HORACE HART,

Appellant,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Cameron and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of judgment dismissing this action on the ground that the statutory amount is not in controversy;

It is further ordered and adjudged that the appellee, United States Fidelity and Guaranty Co., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissenting."

June 20, 1962

Issued:

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19127

(R. Aguirre 30)

STANDARD ACCIDENT INSURANCE COMPANY,
Appellant,

versus

MARCOS V. AGUIRRE, JR.,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(June 20, 1962)

Before TUTTLE, Chief Judge, RIVES and Jones, Circuit Judges.

PER CURIAM: This case is similar to *Hardware Mutual Casualty Company v. McIntyre* decided this same day by this Court, Docket No. 18,557. The question involved here is whether the District Court properly dismissed the appellant insurer's suit to "set aside" an award made to the appellee by the Texas Industrial Accident Board on the ground that the amount in controversy did not exceed $10,000.

The following facts are undisputed: The appellee, having been injured in the course of his employment, filed a claim for compensation with the Industrial Accident Board in the amount of $14,035, the maximum compensation allowable under Texas law. The Board's award was for $146.65. The appellant, the compensation carrier of the appellee's employer, then brought this suit to "set aside" the award, asserting that the amount in controversy exceeded $10,000. The appellee denied the jurisdictional allegation, and asserted a claim against the appellant for $8,750.00. The appellee also moved to dismiss for want of jurisdiction, which motion was granted by the District Court.

Thus stated, the facts of this case bring it within the rule enunciated in *Hardware Mutual Casualty Company v. McIntyre*, 5 Cir., F. 2d . We there held that, in a suit by an insurer attacking an award made by the Texas Industrial Accident Board, the amount in controversy is fixed by the amount claimed by the *insured* in the suit. Since the appellee-insured in the instant case made claim for $8,750, it follows that the amount in controversy requirement was not satisfied and that the District Court was, therefore, correct in dismissing the suit for want of jurisdiction.

AFFIRMED.

RIVES, Circuit Judge, dissents, his dissenting opinion appears in No. 19184, *Horace Hart v. United States Fidelity and Guaranty Company.*

C-3

No. 19127
(R. Aguirre 37)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Standard Accident Insurance Company, and the surety on the appeal bond herein, Great American Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents."

* * * * *

APPENDIX D

No. 4327
(R. McIntyre 25)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

ORDER SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of jurisdiction in the above cause came on for hearing; and the court having heard said Motion and the court having reviewed contents of the full case on file, the court is of the opinion and finds the following:

I.

That defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the bases of the above action before the Industrial Accident Board of the State of Texas for the sum of TEN THOUSAND ($10,000) DOLLARS or more.

II.

That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in the above case for a sum amounting to TEN THOUSAND $(10,000.00) DOLLARS or more.

III.

That the Motion filed by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction in this Court should be and is hereby sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED, and DECREED by the court that Motion filed herein by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction of this Court is sustained and said cause of action is hereby dismissed for want of jurisdiction.

To which Order and Ruling of the Court the plaintiff, Hardware Mutual Casualty Company, duly and timely excepted in open court and gave notice of appeal to the 5th Circuit Court of Appeals.

ENTERED AND SIGNED this 15th day of August, 1960.

Original Signed by
JOE J. FISHER
United States District Judge.

D-3

No. 4327
(R. McIntyre 33)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY,

v.

ADAM MCINTYRE

MEMORANDUM DECISION

The plaintiff, Hardware Mutual Casualty Company, a Wisconsin corporation, instituted this suit on June 21st, 1960, against the defendant, Adam McIntyre, a resident and citizen of Jefferson County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas, made by that Board on June 20th, 1960, ordering the plaintiff to pay to defendant, workmen's compensation benefits under the Workmen's Compensation Law of the State of Texas, of $22.01 per week for fifteen consecutive weeks, beginning January 16, 1960, for injuries received which resulted in incapacity to labor. Plaintiff alleges in its original complaint, paragraph 4, that defendant filed a claim with the Industrial Accident Board of the State of Texas, alleging an injury, which was general, total and permanent; the defendant denies that the claim filed with the Industrial Acci-

dent Board of the State of Texas was based on an allegation of total and permanent disability, but that his claim was for a general injury, without any reference to the general injury being total and permanent. Based on said allegations of the defendant in his claim filed before the Industrial Accident Board of the State of Texas, and the diversity of citizenship that exists between plaintiff and defendant, defendant asserts jurisdiction of this Court in this cause under the provisions of 28, U.S.C.A., 1332, as amended.

On July 13, 1960 the defendant filed a motion to dismiss the cause for want of jurisdiction, alleging that the defendant, Adam McIntyre, did not file a claim before the Industrial Accident Board of the State of Texas for total and permanent disability, and that said allegation on the part of the plaintiff is false, and made for the purpose of conferring jurisdiction on the United States District Court. On the same defendant filed a cross-action against plaintiff, subject to his motion to dismiss, in which cross complaint he sought to recover from the plaintiff workmen's compensation benefits because of incapacity to labor he claims he suffered as the result of his injury on or about January 15, 1960, for one hundred weeks of total disability at the rate of $35.00 per week, to be followed by three hundred weeks of partial disability at the rate of $21.00 per week, or for the aggregate sum of $9,000.00.

It further appears from the pleadings that defendant and cross plaintiff, Adam McIntyre's, claim before the Industrial Accident Board of the State of Texas did not make a specific claim for total and permanent disability as a result of said

injury, but claimed only general injuries to his body without any attempt to estimate the extent and duration of said injuries. Further, plaintiff's reply to the defendant's motion to dismiss, discloses that on June 23, 1960, three days after the Industrial Accident Board Award, and two days after the plaintiff had filed its complaint in this Court, defendant and cross plaintiff filed a suit in the District Court of Jefferson County, Texas, alleging that said injuries resulted in total and permanent disability.

The plaintiff cites in support of its motion to dismiss for want of jurisdiction, the landmark case of *Booth v. Texas Employers' Ins. Ass'n.*, 123 S. W. 2d 322, and the recent case decided by the Fifth Circuit, Liberty Mutual Ins. Co. v. Horton, 275 Fed. 2d 148.

The court recognizes the authorities cited as being the law on the point, that jurisdictional amount is determined by the claim made before the Industrial Accident Board of the State of Texas, and it is the Court's opinion that this case does not present a similar fact situation, because the defendant and cross plaintiff did not claim or contend for compensation in the amount of $10,000.00 or more in his claim filed before the Industrial Accident Board of the State of Texas.

The fact that defendant and cross plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability will not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability because said suit was admittedly filed three days

after the Industrial Accident Board's Award, and two days subsequent to the plaintiff's complaint filed in this Court.

This Court concludes that it does not have jurisdiction of this case, because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained.

ENTERED this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge.

D-7.

No. 4327

(R. McIntyre 35)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

AMENDED ORDER SUSTAINING MOTION TO DISMISS

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's motion to dismiss for want of jurisdiction in the above cause came on for hearing, and the Court having heard said motion, and reviewing the pleadings on file in said cause, sustained said motion and entered an order dismissing said cause for want of jurisdiction. The Court has again, reviewed said file, attempting to bring it within the purview of a recent case decided by the Fifth Circuit, to-wit, Liberty Mutual Insurance Company v. Horton, 275 F. ed. 2d 148, and after comparing the facts of the respective cases, is of the opinion that the Horton case would be an authority for the Court's action in sustaining defendant's motion to dismiss for want of jurisdiction, rather than an authority for the plaintiff's position that the motion to dismiss for want of jurisdiction should be overruled.

THEREFORE, BE IT REMEMBERED that on this, the 24th day of August, A. D. 1960, the Court again considered

the motion of the defendant, Adam McIntyre, to dismiss the above entitled and numbered cause on the ground that the jurisdictional amount of this Court was not involved, and the Court being of the opinion that the jurisdictional amount in this cause is for a sum less than $10,000.00; That the defendant and cross-plaintiff, Adam McIntyre did not make a claim for compensation before the Industrial Accident Board of the State of Texas for the sum of $10,000.00 or more; That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in this Court for a sum amounting to $10,000.00 or more, but has specifically sued for compensation in the amount of $9,000.00; and the Court being of the opinion that the jurisdictional amount in this case is the sum of $9,000.00, as the amount in controversy, and further being of the opinion that the defendant's motion to dismiss for want of jurisdiction should be in all things granted and sustained;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the above numbered and entitled cause, be, and the same is hereby, dismissed for want of jurisdiction in this Court, to which action of the Court, the Plaintiff in open Court excepted and objected and gave its notice of appeal to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

RENDERED AND ENTERED, this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge.

Filed August 24, 1960.

APPENDIX E

(R. Hart 22)

Judgment of the United States District Court for the Northern District of Texas, entered June 16, 1961 (R. Hart 22.)

[Heading Omitted]

JUDGMENT

The above entitled and numbered cause came on regularly to be heard on the 12th day of June, 1961, and came Horace M. Hart, by his attorneys, and announced in open court that the said Horace M. Hart waived his plea to the jurisdiction of the Court previously filed in the cause. And came United States Fidelity and Guaranty Company, by its attorney; and the parties; through their respective attorneys, announced ready for trial. And through their said attorneys, it was stipulated by the parties that for convenience, the nominal Defendant, Horace M. Hart, would be known in the trial as the Plaintiff, and the nominal Plaintiff, United States Fidelity and Guaranty Company, a corporation, would be known in the trail as the Defendant. And came a Jury of twelve (12) good and lawful jurors, who being duly empaneled and sworn, after having considered the pleadings as presented by respective counsel, evidence and argument of counsel, did in open court return their verdict in response to the Court's charge as follows:

> "We, the Jury, find for the Plaintiff total disability for eleven (11) weeks Partial Disability to the extent of 33⅓% for 68 weeks.
>
> William J. Moore, Foreman,"

Said findings of the Jury were received by the Court and accepted by the Court as the verdict of the Jury and were filed and entered of record on the Minutes of the Court.

It appearing to the Court from the undisputed evidence that the Defendant, United States Fidelity and Guaranty Company, has previously paid the Plaintiff, Horace M. Hart, eleven (11) weeks total disability at $35.00 per week, which is the maximum compensation rate, it is the opinion of the Court that Plaintiff is not entitled to recover anything further for total disability.

It having been agreed in open court that the average weekly wages of the Plaintiff, Horace M. Hart, before his injury was $90.00 per week, and it having been agreed in open court that any sum that might be awarded to the Plaintiff, Horace M. Hart, would be awarded to him in a lump sum, the Court is of the opinion that the Plaintiff, Horace M. Hart, is entitled to recover of and from the Defendant, United States Fidelity and Guaranty Company, sixty per cent (60%) of one-third (⅓) of $90.00 per week for a period of sixty-eight (68) weeks, or a total of $1224.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Horace M. Hart, do have and recover of and from the Defendant, United States Fidelity and Guaranty Company, the sum of $1224.00, together with all costs of suit, for which execution may issue. Out of said sum of $1224.00, $367.20 is to be received by Marvin Jones and Jack Gay of Dallas, Texas, for their services in representing said Plaintiff, Horace M. Hart.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of the Industrial Accident Board of the State of Texas entered on the 21st day of June, 1960, in cause No. U-11014 styled "Horace M. Hart, Employee, Wesco Materials Corporation, Employer, United States Fidelity and Guaranty Company, Insurer", be and the same is hereby set aside and held for naught.

To the foregoing judgment, the Plaintiff, Horace M. Hart, excepted and is allowed an exception.

SIGNED AND ENTERED THIS 15 day of June, 1961.

/s/ T. Whitfield Davidson
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ M. C Jones
OF ATTORNEYS FOR
PLAINTIFF

/s/ Curtis White
ATTORNEY FOR
DEFENDANT

APPENDIX F

(R. Aguirre 17)

No. 3007

In the District Court of the United States for the Western District of Texas, San Antonio Division

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

ORDER OF DISMISSAL

On the 11th day of December, 1961, at a hearing in this Court, the Defendant urged on this Court his Motion to Dismiss on the ground that the jurisdictional amount of $10,000.00 was not involved herein, and asked that this case therefore be dismissed for want of jurisdiction. The Court thereupon proceeded to inquire into the facts relative to such jurisdictional amount and finds the following to be the undisputed facts:

(1) That in the claim filed by Defendant before the Industrial Accident Board, total and permanent disability was asserted.

(2) That the proper wage rate as asserted before the Industrial Accident Board was the maximum amount of

$35.00 per wek and under the laws of Texas, 401 weeks of compensation are payable for total and permanent disability.

(3) On September 25, 1961, the Industrial Accident Board rendered its final decision awarding the defendant compensation based upon five (5) weeks at $29.33 per week, or a total of $146.65.

(4) Subsequently, the Standard Accident Insurance Company gave timely notice of appeal before the Industrial Accident Board and thereafter filed suit to set aside such final award of the Board in the United States District Court for the Western District of Texas, San Antonio Division, on September 26, 1961, at 10:35 o'clock A.M.

(5) Later on the same date, at 2:02 o'clock P.M., the Defendant, after giving timely notice of appeal, filed suit as plaintiff in the 45th District Court of Bexar County, Texas, in Cause No. F-139-313, seeking to set aside the award of the Industrial Accident Board and asking for judgment for total and permanent disability for 401 weeks of compensation of $35.00 per week or a total of $14,035.00.

(6) On December 5, 1961, Defendant filed his Motion to Dismiss, his answer and his counterclaim in this Court, alleging in his counterclaim only 250 weeks total temporary compensation at $25.00 a week or a total of $8,750.00 against Standard Accident Insurance Company.

(7) On December 11, 1961, the date of the hearing in this Court, the State Court suit for $14,035.00 was still pending and had been set on the March 1962 docket.

(8) At said hearing on December 11, 1961, counsel for Defendant orally gave his word to the Court that he had intended to and would amend the petition in the State Court to correspond to the allegations in his counterclaim in this Court, and that once said amended petition asking only for 250 weeks at the rate of $35.00 per week was filed in the State Court, Defendant would not thereafter again assert a claim for total and permanent disability.

(9) That in compliance with his word to the Court, and in order to show good faith, counsel for Defendant on December 12, 1961, filed in the 45th Judicial District Court of Bexar County, Texas, in said Cause No. F-139-313, a First Amended Original Petition on behalf of this Defendant as the Plaintiff in said cause, in which it was alleged that the Plaintiff therein, Marcos V. Aguirre, Jr., was seeking compensation for total and temporary disability for 250 weeks.

(10) That on December 15, 1961, in a stipulation filed in this cause on behalf of Defendant, it was asserted that he would not amend his paid petition filed on December 12, 1961, in the 45th Judicial District Court of Bexar County, Texas, so as to claim more compensation than 250 weeks for his total and temporary incapacity at $35.00 per week.

The Court, after considering all of the above facts, is of the opinion and finds that under such facts the jurisdictional amount of $10,000.00 is not present in this case, and, therefore, this Court does not have jurisdiction.

It is therefore ordered that this cause be and the same is hereby dismissed for want of jurisdiction.

To action of the Court in dismissing this cause for want of jurisdiction, the Standard Accident Insurance Company excepted.

Signed this the 19th day of December, A.D. 1961.

ADRIAN A. SPEARS,
(Adrian A. Spears),
United States District Judge.

Entered: Civil Order Book, Vol. No. 9, Page 664.

Filed December 19, 1961.

No. 3007

In the District Court of the United States for the Western District of Texas, San Antonio Division

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

OPINION

(R. Aguirre 20)

Plaintiff, Standard Accident Insurance Company, a Michigan corporation, filed this workmen's compensation suit to set aside a final decision of the Industrial Accident Board of Texas, which awarded the defendant, Marcus V. Aguirre, Jr., the total sum of $146.65, based upon five (5) weeks total temporary disability at the rate of $29.33 per week. Defendant had sought from the Board total permanent disability for 401 weeks at the rate of $35.00 per week.

In addition to diversity of citizenship, plaintiff alleged that the controversy involved in excess of $10,000.00, since the amount demanded before the Board totalled $14,035.00.

On the same day that this action was filed, but several hours later, the defendant instituted suit in the District Court of Bexar County, Texas, also seeking to set aside the Board's decision, and asking for judgment in the amount of

$14,035, representing total permanent disability for 401 weeks at the rate of $35.00 per week.

Subsequently, defendant filed a motion to dismiss this suit, contending that the Court has no jurisdiction, because the amount in controversy is less than $10,000. Contemporaneously therewith "if the same be necessary" he filed an answer denying that this Court has jurisdiction, and also a counterclaim in which he seeks total temporary disability at the rate of $35.00 per week for only 250 weeks, or a total sum of $8,750. This constitutes the only claim for compensation filed by defendant in this Court.

In compliance with representations made at the time of the hearing on said motion, and as evidence of his good faith, defendant amended his petition in state Court to correspond to the allegations of his counterclaim in this Court, and, through his attorney of record in both cases, filed herein a stipulation and promise that he would not thereafter again assert a claim in state Court for more than 250 weeks at the rate of $35.00 per week.

Recognizing the congested condition of the dockets in federal Courts, Congress, in 1958, increased the jurisdictional amount in diversity of citizenship cases to $10,000,[1] and provided that a "civil action in any State Court arising under the workmen's compensation laws of such State may not be removed to any district Court of the United States."[2]

Ordinarily, the one who claims that something is due or belongs to him initiates a lawsuit as the plaintiff therein.

[1] 28 U.S.C., Section 1332.

[2] 28 U.S.C., Section 1445(c).

His complaint, filed in apparent good faith, generally determines the amount in controversy, unless the law gives a different rule. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 388; 82 L. Ed. 845; 58 S. Ct. 586. However, the Texas Workmen's Compensation Law permits either the employee or the insurance company to bring suit to set aside the final ruling of the Industrial Accident Board, but when the insurance company wins the race to the Courthouse, and the employee for the first time asserts his claim in federal Court in a counterclaim, he still has the burden of proving his right to recover.

The determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, and the amount originally claimed before the Industrial Accident Board does not control. Horton v. Liberty Mutual Insurance Co., 367 U. S. 348, 352; 6 L. Ed. (2) 890; 81 S. Ct. 1570. In the Horton case, supra, the contention was made that the Board's award of $1,050 determined the amount in controversy. The Supreme Court in upholding the jurisdiction of the district Court in that case, pointed out, among other things, that the petitioner's claim before the Board was $14,035; that his state Court suit asked that much; that he had not denied the jurisdictional allegations of respondent's complaint; that his conditional counterclaim in federal Court claimed the same amount; and that he made no attempt to surrender or disclaim any part of his original claim.

Art. 8307, Section 5, Vernon's Annotated Texas Statutes.

Here, although the original claim before the Industrial Accident Board and in State Court was in excess of $10,000, the Board's award was only $146.65. The defendant in his answer denied that this Court has jurisdiction, and he has, in good faith, the only time his claim was asserted in federal Court, surrendered $5,285 of his original demand. It is clear that this claim in both state and federal Courts is limited to 250 weeks total temporary disability at the rate of $35.00 per week, or $8,750. Since, therefore, he does not really have a claim in excess of $10,000, it is my opinion that the motion to dismiss for want of jurisdiction should be granted, and judgment is being entered accordingly.

ADRIAN A. SPEARS,
(Adrian A. Spears),
United States District Judge.

Filed December 19, 1961.

APPENDIX G

Workmen's Compensation Law, Texas Civil Statutes Vernon's Art. 8307, Sec. 5

Art. 8307 (in relevant part)

Determination of Questions: Suit to Set Aside Final Ruling and Decision

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of the law, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provision of this law, and the suit of the injured employee or person suing on account of the death of such em-

ployee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscribed as defined in this law. If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court upon request free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissibel in evidence in any court in this State upon trial of such claim therein pending and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the association, it shall at once comply with such final ruling and decision; and failing to do so the board shall certify the fact to the Commissioner of Insurance and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such association to business in Texas.

APPENDIX H

Workmen's Compensation Law, Texas Civil Statutes Vernon's Art. 8306, Sec. 10

Art. 8306 (in relevant part)

Total Incapacity

Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to sixty per cent (60%) of his average weekly wages, but not more than Thirty-five Dollars ($35) nor less than Nine Dollars ($9) and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury.